Supreme Court, U.S.
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No. 05-595

In the Supreme Court of the United States

GLEN WHORTON, Director,
Nevada Department of Corrections,
Petitioner,

v.

MARVIN HOWARD BOCKTING,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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Rule

Sup. Ct. R. 15(8) 1

The Petitioner above-named, Glen Whorton, Director, Nevada Department of Corrections, does hereby inform this honorable Court of a new case from the Eleventh Circuit pertinent to the resolution of the matters raised herein, pursuant to Supreme Court Rule 15(8). As a new case, it was not available at the time of the filing of the Petitioner's Petition for Writ of Certiorari.

Supreme Court Rule 15(8) governs the filing of Supplemental Briefing to inform the Court of new cases, new legislation, or other intervening matter not available at the time of the party's last filing. That Rule provides:

> Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing. A supplemental brief shall be restricted to new matter and shall follow, insofar as applicable, the form for a brief in opposition prescribed by this Rule. Forty copies shall be filed, except that a party proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The supplemental brief shall be served as required by Rule 29.

Supreme Court Rule 15(8).

On April 3, 2006, the United States Court of Appeals for the Eleventh Circuit filed a published decision in the case Espy v. Massac, Warden, No. 04-16416, ___ F. 3d ___, WL 845376 (April 3, 2006). In that decision, the court held that this Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004) did not apply retroactively under

the test announced in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, rehearing denied, 490 U.S. 1031, 109 S.Ct. 1771 (1989).

In Espy, the Eleventh Circuit held that Crawford announced a new rule:

> Under prior precedent, the recorded prior testimony of an unavailable declarant could be admitted upon a showing of sufficient indicia of reliability, even without cross-examination. *Roberts*, 448 U.S. at 65, 100 S.Ct. at 2539; *see also White*, 502 U.S. at 353-54, 112 S.Ct. at 742-43 (applying the *Roberts* requirement of sufficient indicia of reliability). *Crawford* abrogated *Roberts* and established the rule that no recorded testimonial statement can be admitted at trial unless the proponent establishes (1) that the declarant is unavailable to testify, and (2) that the defendant had a prior opportunity to cross-examine the declarant about his or her statements. *Crawford*, 541 U.S. at 59, 124 S.Ct. at 1369. Since *Crawford* overruled the precedent that would otherwise have dictated the result in the case, it cannot be said that the result in *Crawford* was 'dictated by precedent existing at the time the defendant's conviction became final.' *See Teague*, 489 U.S. at 301, 109 S.Ct. at 1070 (emphasis in original). Thus, applying *Teague's* test, *Crawford* established a new rule.

Espy, p. 3.

Likewise, the Eleventh Circuit held that the new rule of *Crawford* did not apply retroactively:

> The standard for whether a new rule meets the second *Teague* exception is a strict one. Indeed, it is unlikely that the Supreme Court has found any new rule to fit this exception since its announcement. *See Schriro v. Summerlin*, 542 U.S. 348, 352, 124 S.Ct. 2519, 2523, 159 L.Ed. 2d 442 (2004). The *Teague* Court provided only minimal guidance as to the nature of a rule that would meet the exception, but the Court has since cited the rule announced in *Gideon v. Wainwright*, 372 U.S. 335, 343, 83 S.Ct. 792, 796, 9 L.Ed. 2d 799 (1963) as one that would meet the exception were it announced today. *See Saffle v. Parks*, 494 U.S. 484, 495, 110 S.Ct. 1257, 1264, 108 L.Ed. 2d 415 (1990)...Clearly, the right to counsel at trial is a watershed rule that seriously improves the likelihood of an accurate conviction. Although the rule announced in *Crawford* also impacts the accuracy of criminal convictions, it does not qualify as a 'watershed' rule in the mold of *Gideon*. *Crawford* merely altered the existing regime outlined by *White*, 502 U.S. at 355-56, 112 S.Ct. at 742-43, and *Roberts*, 448 U.S. at 65, 100 S.Ct. at 2539. At least five other circuits have directly addressed this issue, and all but one have either concluded or suggested that *Crawford* does not apply retroactively...

Espy, at p. 3-4.

In Espy, therefore, the Eleventh Circuit expressly rejected the Ninth Circuit's holding in Bockting v. Bayer, 399 F.3d 1010 (*Bockting I*), and Bockting v. Bayer, 408 F.3d 1127 (*Bockting II*), *rehearing en banc denied*, Bockting v. Bayer, 418 F.3d 1055 (9th Cir. 2005), and joined the majority of Circuit Courts holding that Crawford does not apply retroactively.

Petitioners, therefore, inform the Court of the new authority from the Court of Appeals for the Eleventh Circuit that bears upon the issues presented in the Petition for Writ of Certiorari.

Respectfully Submitted,

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